In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-18

CALVIN EUGENE HUFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 922(a)(1), which prohibits dealing in firearms as a business without a license, is unconstitutionally vague, that the trial court's instructions to the jury did not adequately state the elements of the offense, and that the evidence was insufficient to support his conviction.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of having engaged in the business of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 924(a). He was sentenced to two years' imprisonment, subject to the immediate parole eligibility provision of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. 1a-3a).

The evidence showed that in April 1973 petitioner, who was the sergeant in charge of the base rifle range at the Marine Corps Air Station in Quantico, Virginia, invited Sgt. Larry Kirkwood to his house, showed him several weapons, and told him that "he had access to almost any quantity of 45 weapons and ammunition * * * " (Tr. 18-19).[1]

During August and September 1973, Kirkwood and petitioner engaged in a number of transactions involving the purchase and sale of firearms, firearm parts, and ammunition. On August 29, Kirkwood obtained from petitioner four cans of .45 caliber ammunition and three cans of .308 caliber ammunition which he used to obtain a rifle for petitioner (Tr. 20-24). On September 6, Kirkwood purchased three Essex pistol frames, which petitioner then built into pistols for him (petitioner had all the necessary parts except the frames), in return for a tape recorder (Tr. 26-28).

On September 8, Kirkwood and his brother James obtained a large quantity of ammunition from petitioner, which they took to West Virginia in a rented truck. The following day, after talking to petitioner, Kirkwood, apparently in payment for the ammunition, purchased a chrome plated .22 magnum pistol for petitioner (Tr. 29-31, 96). Later in the month he similarly purchased a Remington rifle for petitioner. During September and October 1973, petitioner also sold Kirkwood a .45 caliber pistol for $100, built up two additional .45 frames for him in return for another weapon, and transferred additional ammunition to him (Tr. 34-36, 38-42). Petitioner told Kirkwood that he wanted to get rid of the ammunition because he felt that "the heat was * * * on" and a certain "Jack" "was going to rat on him" (Tr. 83).

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[1]Tr. refers to the transcript of the trial. Sgt. Kirkwood testified for the United States.

Petitioner engaged in numerous transactions with persons other than Kirkwood, primarily involving pistol parts (Tr. 123-124, 151-153). In September 1973, Sgt. Michael Mace heard that petitioner had a Walther P-38 pistol for sale. He spoke to petitioner, who said that he was selling it for someone else who wanted two .45 receivers for it. Mace traded two receivers for the P-38 (Tr. 172-173). One of these receivers was ultimately built up into a .45 pistol, which Kirkwood's brother sold to federal undercover agents in West Virginia (Tr. 97-98).[2]

1. Petitioner contends that 18 U.S.C. 922(a)(1)[3] is unconstitutionally vague in that it does not provide a sufficient standard to determine when one is "engage[d] in the business of * * * dealing" in firearms or ammunition.

18 U.S.C. 921(a)(11) defines "dealer" as follows:

> The term "dealer" means (A) any person engaged in the business of selling firearms or ammunition at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term "licensed dealer" means any dealer who is licensed under the provisions of this chapter.

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[2]For other of petitioner's dealings in firearms, see Tr. 173-174, Gov't. Ex. 5, Tr. 23-24, 174-176, 183-185, 191-193. In several of these instances petitioner required purchasers to fill out federal firearms forms (Tr. 176, 183-185).

[3]18 U.S.C. 922(a)(1) provides:

> (a) It shall be unlawful—
>
> (1) for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce * * *.

In light of this definition of "dealer," Section 922(a)(1), in proscribing "engag[ing] in the business of * * * dealing in firearms or ammunition," establishes a standard sufficiently certain to apprise a person of ordinary intelligence of the conduct that is prohibited.

The courts of appeals that have ruled on the issue have all held that Section 922(a)(1) is not unconstitutionally vague. See *United States* v. *Wilkening*, 485 F.2d 234, 235 (C.A. 8); *United States* v. *Day*, 476 F.2d 562, 567 (C.A. 6); *United States* v. *Gross*, 451 F.2d 1355, 1357-1358 (C.A. 7); *United States* v. *Jackson*, 352 F. Supp. 672, 673-674 (S.D. Ohio), affirmed, 480 F. 2d 927 (C.A. 6); see also, *United States* v. *Williams*, 502 F.2d 581, 583 (C.A. 8); *United States* v. *Zeidman*, 444 F.2d 1051, 1054-1055 (C.A. 7). Most of these decisions, recognizing that there is no express statutory definition for the phrase "engage in the business," have adopted the standard enunciated by the Seventh Circuit in *United States* v. *Gross, supra*, 451 F.2d at 1357:

> There appears to be little doubt that "dealer" means anyone who is engaged in *any* business of selling firearms, and that "business" is that which occupies time, attention and labor for the purpose of livelihood or profit. [Citation omitted.]

However, the decision of the district court in *United States* v. *Jackson, supra*, which was affirmed by the Sixth Circuit without published opinion, after stating the *Gross* standard, took a slightly different view of the meaning of "engage in the business" (352 F. Supp. at 674):

> In view of the purpose of the Gun Control Act of 1968 to assist crime control, we conclude that anyone is engaged in the business of dealing in firearms if they have guns on hand or are ready and able to procure them, in either case for the purpose of selling some or all of them to such persons as they might from time to time conclude to accept as customers.

The only difference between the two definitions appears to be that the *Gross* definition specifically requires the government to prove that a defendant's dealings in firearms were "for the purpose of livelihood or profit." In light of the statutory purpose of controlling crime by regulating firearms transactions,[4] the *Jackson* definition of the phrase "engage in the business" in our view more accurately reflects the intent of Congress.

But the court of appeals in the instant case adopted the more stringent *Gross* standard and held that the government was specifically required to prove a profit motive (Pet. App. 2a). The government did so, and petitioner presents no reason for review in complaining (Pet. 5-11) that the court of appeals held the government to a stricter standard of proof in his case than might be imposed in another circuit.

2. Petitioner further contends (Pet. 12-15) that in light of the court of appeals' holding with regard to the elements of the offense, the instructions of the trial court were deficient in that they failed to instruct the jury that, in order to convict, it was required to find a willingness to deal, a profit motive, and a greater degree of activity than occasional sales by a hobbyist. He asserts that the court of appeals thus erred in not remanding the case for a new trial.

The court of appeals did not err in this respect. The pertinent portion of the trial court's charge to the jury was as follows (Tr. 319-321, 331-333):

> In deciding whether the defendant was engaged in the business of dealing in firearms or ammunition during the period covered by the indictment, you may take into account any of the following—no one of which is controlling.

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[4]See Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197; S. Rep. No. 1097, 90th Cong., 2d Sess. (1968); 1968 U.S. Code Cong. and Adm. News, pp. 2112-2309.

First, the number and type of firearms and quantities of ammunition that were owned, purchased, or sold by the defendant; the number of firearms "built up" or assembled by the defendant, or caused to be built up or assembled by him;

Whether the defendant made a profit from any sale or transaction involving firearms or ammunition;

The frequency of those transactions;

The purpose for which the firearm or ammunition was owned or possessed by the defendant;

The extent to which the defendant devoted time, attention, and effort to the endeavor of selling firearms or ammunition or repairing or assembling guns.

A person who collects firearms for his own use or enjoyment and toward that purchase [sic] occasionally buys or sells a gun is not dealing in firearms within the meaning of the law.

Of course, he is not charged just with dealing in firearms. He is charged with dealing in ammunition.

It is not necessary for the government to prove any specific number of transactions. A person can be a small dealer as well as a large dealer. Nor is it necessary that any actual profit be shown by the government.

It need not be his only business, but the test is: Was any selling of firearms or ammunition or building up of firearms a business as distinguished from a hobby?

To be a sale, of course, the transfer of ammunition or firearm need not be for cash. It can be for a commodity.

If, for example, as contended by the government, the ammunition was transferred by the defendant in exchange for a commodity such as another gun, this would constitute a sale.

In determining the sufficiency of jury instructions, it is necessary to view them as a whole. See, *e.g.*, *United States* v. *Park*, No. 74-215, decided June 9, 1975. Here, when viewed in their entirety, the instructions were sufficient even under the stringent standard adopted by the court of appeals. The elements of willingness to deal and of the distinction between a business and a hobby are adequately covered, though not in the precise language subsequently used by the court of appeals. Moreover, the trial court's reference (Tr. 320) to "whether the defendant made a profit" properly alerted the jury to the presence of a profit motive as a relevant consideration.

In any event, in light of petitioner's failure to request an instruction on profit motive or to object to the instructions as given, as well as his failure to raise the issue on appeal, the trial court's instruction which was not plain error, does not merit further review. Fed. R. Crim. P., Rule 30.

3. Finally, petitioner argues (Pet. 15-19) that the evidence was insufficient in that no profit motive was proven. In support of this argument he points to a number of transactions in which he allegedly derived no profit. This contention, however, is meritless. The evidence fully established that petitioner engaged in these transactions for profit and was most likely succeeding in realizing one. This conclusion is strongly supported by the large number of customers and transactions involved. Those transactions included sales of firearms and sales of ammunition as well as the building up of firearms, and they took the form of both barter and sale for cash. Petitioner was known as someone who could get almost any quantity of .45 caliber pistols and ammunition, and others referred potential customers to him (Tr. 19). James Kirkwood told undercover agents that petitioner was his "source" of weapons (Tr. 120-121).

The evidence also established that the ammunition petitioner dealt in was of military origin (Tr. 201, 218-219, 245). The jury could infer that petitioner appropriated this ammunition and traded it for weapons, in which case he was clearly making a profit—*i.e.*, receiving valuable weapons in return for ammunition that cost him nothing. In one instance petitioner sold a weapon, received in exchange for ammunition, for $90.00 in cash (Tr. 173-174). The conclusion that petitioner was taking Marine Corps ammunition is further supported by petitioner's desire to get rid of the ammunition when he felt the "heat was on" (Tr. 83).

In short, the overwhelming weight of the evidence supports the conclusion that petitioner was not a mere hobbyist occasionally buying and selling guns, but rather he was engaged in a profit-seeking enterprise. See, *e.g.*, *United States* v. *Day*, *supra*; *United States* v. *Gross*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.